Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Broadcast EEO	)	
Rules and Policies, Vacating	)	MM Docket No. 96-16
the EEO Forfeiture Policy	)	
Statement and Amending Section	)	
1.80 of the Commission's	)	
Rules to Include EEO	)	
Forfeiture Guidelines	)	

COMMENTS OF CHRISTIAN LEGAL SOCIETY'S
CENTER FOR LAW AND RELIGIOUS FREEDOM;
CONCERNED WOMEN FOR AMERICA; AND
FOCUS ON THE FAMILY

OF COUNSEL:
Thomas C. Berg
Cumberland School of Law
Samford University
Birmingham, AL 35229
(205) 870-2415

Steven T. McFarland
Center for Law and Religious
Freedom
Christian Legal Society
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

DATED: July 11, 1996

No. of Copies rec'd
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Broadcast EEO	)	
Rules and Policies, Vacating	)	MM Docket No. 96-16
the EEO Forfeiture Policy	)	
Statement and Amending Section	)	
1.80 of the Commission's	)	
Rules to Include EEO	)	
Forfeiture Guidelines	)	

COMMENTS OF CHRISTIAN LEGAL SOCIETY'S CENTER FOR LAW AND RELIGIOUS FREEDOM, CONCERNED WOMEN FOR AMERICA, AND FOCUS ON THE FAMILY

Introduction and Summary

The Center for Law and Religious Freedom of the Christian Legal Society, Concerned Women for America and Focus on the Family submit the following comments in the above-captioned proceeding. The interests of the commenters are set forth in the attached Appendix.

Our comments are limited to the following subject. Seconding the request made in the comments of the National Religious Broadcasters (NRB) [1] we urge the Commission to amend its EEO

---

[1]Comments of National Religious Broadcasters, MM Docket No. 96-16 (filed April 30, 1996).

policies to provide that a religiously affiliated broadcaster may prefer individuals of a particular faith in employment in all of its activities. This rule would amend the Commission's current "King's Garden" approach,[2] which allows a religious broadcaster to prefer members of its own faith only in those positions that the Commission concludes are directly connected with the espousal of the broadcaster's religious views.

This proposed amendment will conform the Commission's policy to that enacted by Congress in Title VII of the Civil Rights Act of 1964, the nation's fundamental equal employment law, which permits a religious organization to prefer members of its own faith in employment in any of its activities. It will also serve the goal set forth in the Notice of Proposed Rulemaking (NPRM): to "provide relief" to "licensees of smaller stations and other distinctly situated broadcasters" (NPRM, para. 1). For each of the reasons set forth below, religious broadcasters are "distinctly" and significantly burdened by the Commission's prohibition against preferring members of their own faith in certain jobs.

A religious broadcaster has a significant religious liberty interest in preferring members of its own faith in employment, in order to ensure that its activities are carried out by persons committed to the station's religious views and mission. The current King's Garden policy permits the Commission to second-guess the religious broadcaster's understanding of its mission and also

---

[2]See King's Garden, Inc., 34 F.C.C.2d 937, aff'd, 38 F.C.C.2d 339 (1972), aff'd, King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir. 1974).

puts the Commission in the position, impermissible for a government agency, of determining the essentially theological question of whether an activity is religious. The result is that religious broadcasters are denied the power of self-definition enjoyed by broadcasters who are committed to non-religious ideological causes. There is no sufficient justification for these serious infringements of religious liberty -- as Congress repeatedly has found in enacting bright-line exemptions in Title VII that protect religious preferences by religious organizations in all their activities.

Discussion

The Commission's EEO rules generally forbid a broadcaster to discriminate in employment on the basis of religion or on the basis of race, sex, or ethnic or national origin. 47 C.F.R. § 73.2080. In this respect, the Commission's rule follows the lead of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. However, since a 1972 amendment, Title VII has recognized the freedom of a religious organization to prefer members of its own faith in employment, and thus be exempt from the religious-discrimination prohibition in all of its activities. Section 702, 42 U.S.C. § 2000e-1.[3]

The Commission, by contrast, has declined to recognize the

---

[3]This section states in pertinent part that Title VII "shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its activities."

same broad freedom. Since King's Garden, Inc., 34 F.C.C.2d 937, 938 (1972), the Commission has held that only "those persons hired to espouse a particular religious philosophy over the air should be exempt from the [religious] nondiscrimination rules." See also National Religious Broadcasters, Inc., 43 F.C.C.2d 451, 452 (1973) (exempting only those employees who are "connected with the espousal of the licensee's religious views"). For the following reasons, we urge the Commission to do away with the King's Garden limit on the freedom of religious broadcasters, and recognize the importance of religious freedom to the same degree that Congress has in Title VII.

A. Prohibiting Religious Broadcasters From Exercising Religious Preferences In Employment Infringes Basic Principles Of Religious Liberty.

For the reasons set forth below, the Commission's current policy raises serious threats to religious liberties protected under both the First Amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb ("RFRA").

1. The prohibition on religious preferences places a substantial burden on a religious broadcaster's pursuit of its religious mission.

Religious broadcasters have a strong interest, grounded in religious freedom, in choosing to have their activities carried out by members of their own faith community. Thus there is a strong rationale for exempting religious organizations from laws against religious preferences in employment -- as the Supreme Court found in Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987),

upholding the constitutionality of the broad exemption in section 702 of Title VII. The Court concluded that laws forbidding religious preferences create "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Id. at 335; see id. (describing the effect as a "substantial burden"). As Justice Brennan recognized in his concurrence in Amos,

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself.

Id. at 342-43 (Brennan, J., concurring). And in Texas Monthly v. Bullock, 489 U.S. 1 (1989), a plurality of the Court reemphasized that laws forbidding religious preferences in employment erect a "substantial deterrent" to religious exercise. Id. at 18 n.8.

Accordingly, the Commission's current King's Garden policy triggers the strict standard of justification in the Religious Freedom Restoration Act. RFRA prohibits government from imposing a "substantial burden" on religious exercise unless the burden is "the least restrictive means to a compelling state interest." 42 U.S.C. § 2000bb. (As we will discuss in part B, there is no compelling justification for retaining the current policy.)

The imposition of this burden on religious broadcasters not only triggers strict judicial scrutiny under RFRA, it also infringes on several "hybrid" constitutional rights set forth by the Supreme Court in Employment Division v. Smith, 494 U.S. 872 (1990). The Court in Smith held that the First Amendment remains a strict bar to laws that burden religious exercise "in conjunction

with other constitutional protections, such as freedom of speech and of the press" and "freedom of association." 494 U.S. at 881, 882. As we will discuss in greater detail below, prohibiting a religious broadcaster from preferring members of its own faith as employees infringes on speech and press rights by denying the broadcaster the ability to ensure that its employees in all positions will reflect the station's religious values and viewpoints. The Commission's current policy also infringes on associational rights because, as the Court recognized in Smith, a station's "freedom to speak" its beliefs must also include "'freedom to engage in group effort toward those ends'" (id. at 882 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).

It is no answer to claim, as King's Garden and later decisions have, that religious broadcasters are safeguarded by their ability to hire members in positions that the Commission believes are "connected with the espousal of the licensee's religious views." As the Court noted in Amos, such a narrow exemption still leaves "a significant burden on a religious organization," by

> requir[ing] it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge [or a Commission member] would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336. In concurring, Justice Brennan agreed that "determining whether an activity is religious or secular requires a searching case-by-case analysis," which "results in considerable

ongoing government entanglement in religious affairs" and "create[s] the danger of chilling religious activity" -- as religious organizations shy away from preferring their members in positions that the government might call "secular," even though the organization believes them to be religious. Id. at 343.

For precisely these reasons, Congress passed not only section 702, but also other protections for religion-based employment in Title VII,[4] "to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'" Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991).

There is a host of religiously-motivated reasons why a religious broadcaster may decide to require that all of its employees manifest a religious commitment. To give just a few examples, a broadcaster may believe that its proclamation of its religious beliefs extends to all of its employees' interactions with the public -- not merely to the broadcasting of its beliefs over the airwaves -- and therefore may act on the basis that even secretaries or custodians will have such contact with the public. Or the broadcaster may believe that its religious ministry encompasses relations between employees, not just relations with the general public and therefore want all employees to share

---

[4]For example, section 703(e)(2) of Title VII permits a religiously affiliated educational institution "to hire and employ employees of a particular religion" in any of its activities. 42 U.S.C. § 2000e-2(e)(2).

common membership in the religious community.

The Commission has not been amenable to such self-definition by religious broadcasters, however; and its application of the King's Garden distinction shows the danger of permitting the government to second-guess religious entities' understanding of their religious mission. The opinions in King's Garden, for example, stated that the exemption from the EEO rules would not extend to advertising salespersons, or to on-air announcers who did not read religious messages (34 F.C.C.2d at 938; see also National Religious Broadcasters, Inc., 43 F.C.C.2d at 452) -- even though both of these positions involve substantial public contact and could easily be seen as speaking for the station's religious values. And in Lutheran Church/Missouri Synod, 10 F.C.C.R. 9880 (1995), the Commission staff, pursuant to delegated authority, ruled that a Church-operated radio station associated with a Lutheran seminary could not favor members of that faith in the positions of business manager, engineer, secretary, or receptionist. Id. at 9908-09. In doing so, the staff simply dismissed the Church's evidence that employees in each of these positions interacted regularly with Church headquarters or with pastors or members of Lutheran congregations and thus played roles in the religious activities of the station. Id. at 9886-87. Adoption of the rule we suggest here would correct the staff's mistaken views of the scope of religious freedom.

In short, the limited exemption recognized under King's Garden is simply inadequate to protection the religious liberty of

religious broadcasters.

2. The current policy entangles the Commission in investigating and determining which activities of a broadcaster are "religious."

The King's Garden policy not only chills broadcasters' exercise of religion, it also creates continuing entanglement by the Commission in religious matters and so violates the Religion Clauses of the First Amendment. See NLRB v. Catholic Bishop, 440 U.S. 490, 501 (1979); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (both prohibiting "excessive entanglement" between church and state).

In determining whether a job position is connected with a broadcaster's religious philosophy under King's Garden, the Commission is placed in the impermissible position of determining whether the job is "religious" or "secular." The Amos majority recognized that such determinations by government necessitate an "intrusive inquiry into religious belief," and thus that the broadened, bright-line exemption in Title VII served the purposes of the Religion Clauses by "effectuat[ing] a more complete separation of" church and state. 483 U.S. at 339. And Justice Brennan agreed that a case-by-case distinction between religious and secular activities "results in considerable ongoing government entanglement in religious affairs." Id. at 343.[5]

---

[5]The process of separating out positions that the Commission believes are not religiously significant can also create excessive entanglement simply because of its sheer length and costliness. We note, for example, that the Lutheran seminary station in Lutheran Church/Missouri Synod has been subjected to Commission review for several years in a row based in part on allegations that it favors Lutherans in hiring for various positions. See Lutheran

As the Third Circuit summarized, "[i]t is difficult to imagine an area of the employment relationship less fit for scrutiny by secular courts" than the claim that an "employee's beliefs or practices make her unfit to advance [the organization's] mission." Little, 929 F.2d at 949. The Commission can escape this quicksand by following Congress's lead and adopting the broad exemption recognized in Title VII.

3. The prohibition on religious preferences discriminates against religious broadcasters by denying them rights of self-definition that are enjoyed by other broadcasters.

The intrusion on religious broadcasters from the Commission's rule is illegitimate in yet another way. The burden it places on religious broadcasters is discriminatory in nature and thus violates the Free Exercise Clause under a clear line of recent Supreme Court authority. See Church of Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993); Smith, supra.

Under the EEO rules, broadcasters devoted to the promotion of a cause or ideology that is not religious are free to require that their employees specifically express a commitment to that cause. For example, there is no question that if the Sierra Club owned and operated a radio station, it could require that all employees sign a statement of support for environmental goals, or even that all employees join the organization. The Sierra Club has the right to take these steps to ensure employees' loyalty; and it may do so in all positions, not just those directly "connected with the espousal

---

Church/Missouri Synod, 10 F.C.C.R. 9880.

of [its] views."

The rule against religious preferences, however, denies religious broadcasters this ability to require that employees agree with and commit to the organization's goals. But religious broadcasters should enjoy the same rights in this respect as broadcasters committed to a non-religious ideological cause. In several recent cases, the Supreme Court has recognized that religious citizens and groups bring distinct viewpoints to public issues and thus, under the Free Speech Clause, may not be subject to discriminatory treatment; religion may not be roped off as a separate subject matter distinct from other public views. See Rosenberger v. Rector of Univ. of Virginia, 115 S. Ct. 2510 (1995); Lamb's Chapel v. Center Moriches School Dist., 113 S. Ct. 2141 (1993).

Indeed, the Court has recently made it clear that the Free Exercise Clause forbids government from singling out religious conduct for prohibition. The "essential" guarantee of the clause, the Court has said, is that government may not "in a selective manner impose burdens only on conduct motivated by religious belief." Lukumi, 113 S. Ct. at 2232 (striking down ordinances gerrymandered to prohibit animal sacrifices only by religious group). The prime focus of the Clause in the Court's view, is to ensure that any interference with religious exercise is merely "the incidental effect" of "a neutral, generally applicable law." Smith, 494 U.S. at 878, 881; Lukumi, 113 S. Ct. at 2226. And the clause forbids not only obvious but also "subtle departures from

neutrality." Id. at 2227 (quotation omitted).

As we have shown above, a law against religious preferences is simply not neutral with respect to religion. It is not even neutral on its face, since its very terms refer to religion and distinguish permissible from impermissible conduct on the basis of that reference. As applied to a religious broadcaster, it singles out religious preferences from the ideological preferences a secular broadcaster might use and therefore denies religious broadcasters the same rights of self-definition enjoyed by broadcasters espousing other views. Accordingly, the Court's analysis in Lukumi and Smith require that such laws be struck down unless they satisfy the strictest scrutiny.[6]

Clearly, the rule against religious preferences in employment cannot be said to have merely an "incidental effect" on religious broadcasters. To the contrary, as the Commission's past decisions show, most applications of the rule are likely to be against religious stations who are trying to pursue the same rights of self-definition enjoyed by other stations that are devoted to a non-religious cause. To act as if the ability to employ persons of a particular religion is no more important for a religious group than for anyone else is to adopt the kind of legal attitude so famously satirized by Anatole France: "The law, in its majestic

---

[6]Even Professor Ira Lupu, a leading opponent of legislative and administrative accommodations of religious freedom, suggests that a law forbidding religious preferences in employment "is not neutral [toward religion] in the sense required to trigger the rule [of judicial deference stated] in Smith." Ira C. Lupu, The Lingering Death of Separationism, 62 Geo. Wash. L. Rev. 230, 254 n.191 (1994).

equality, forbids the rich as well as the poor to sleep under bridges." Bartlett's Familiar Quotations 655 (15th ed. 1980). Religious broadcasters are "distinctively situated" as against secular broadcasters with respect to religious preferences in employment, and the Commission's EEO rules should reflect that difference.

B. There Is No Compelling Interest In Preventing Religious Broadcasters From Preferring Persons Of Their Particular Faith In Employment.

In view of the foregoing intrusions on religious liberty, both the First Amendment and the Religious Freedom Restoration Act demand that the Commission have a compelling reason to forbid religious preferences by religious broadcasters. But the rationale for the prohibition is remarkably weak, particularly in the light of Congress's contrary decision in Title VII.

The Commission adopted its EEO rules to "complement, not conflict with, actions" by Congress and other bodies to enforce general policies of equal employment. In re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240, 243 (1969). At the time of adoption of the EEO rules, Title VII only exempted religious preferences by religious organizations in their "religious" activities. But since then, Congress has (in 1972) extended the Title VII exemption to all activities of a religious organization, and the Supreme Court has upheld that extension against constitutional challenge in Amos. Congress has, in effect, declared that there is no compelling governmental interest in

prohibiting religious preferences in employment, and indeed that religious freedom interests call for an exemption. To maintain its posture of cooperation rather than conflict with congressional policy, the Commission should enact an expanded protection for religious preferences.[7]

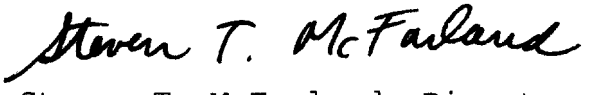
It is important to emphasize the difference between discrimination on the basis of race or sex and "discrimination" by a religious entity on the basis of religion. Preventing race and sex discrimination are at the heart of the nation's equal employment policies. The Supreme Court has made clear that generally private racial discrimination "has never been accorded affirmative constitutional protections." Runyon v. McCrary, 427 U.S. 160, 176 (1976) (adding that "the Constitution . . . places no value on [such] discrimination"). Indeed, the background of the 13th, 14th, and 15th Amendments indicates that racial discrimination (and by analogy sex discrimination) are, if anything, constitutionally disfavored. By contrast, the formation and maintenance of religious communities -- groups of like-minded religious believers -- is an important part of the constitutionally guaranteed exercise of religion. See Amos, 483 U.S. at 342 (Brennan, J., concurring) ("For many individuals, religious activity derives meaning in large measure from participation in a larger religious community."). Like the NRB, we "do[ ] not

[7]We also agree with the comments of the NRB questioning the Commission's authority to regulate broadcasters' EEO practices with respect to positions that the Commission itself asserts bear no relation to a station's programming content. Comments of NRB at 15-18.

advocate and would not support the use of the expanded [religious] exemption as a subterfuge for illicit discrimination against women and minorities." Comments of NRB at 3.

Respectfully submitted,

CHRISTIAN LEGAL SOCIETY



Steven T. McFarland, Director
Center for Law & Religious Freedom

d:\l\l\1039comm.ltr

Appendix

The **Christian Legal Society**, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious exercise and autonomy in the U.S. Supreme Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs amici curiae on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment

by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . ."

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious expression.

Focus on the Family is a California religious non-profit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week.

Concerned Women for America ("CWA") is a national non-profit organization representing approximately 600,000 people. CWA's purpose is to preserve, protect, and promote traditional and Judeo-Christian values through education, legislation, aid, and related public and media activities which represent the concerns of men and women who believe in these values. One of the foremost concerns of CWA is the protection of fundamental religious liberties.